**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**DATTCO, INC.**

**and** **Case No. 34-CA-10228**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 559, AFL-CIO**

***Lindsey E. Kotulski, Esq.***
**Hartford, CT**
**For the General Counsel.**
***George E. O'Brien, Esq.***
**(*Tyler, Cooper & Alcorn, LLP*)**
**New Haven, CT &**
***Deborah D. Cannavino, Esq.***
**(*Tyler, Cooper & Alcorn, LLP*)**
**Stamford, CT.**
**For the Respondent.**

## DECISION

### Statement of the Case

**STEVEN FISH, Administrative Law Judge:** Pursuant to charges and amended charges filed in case Nos. 34-CA-10086, 10145 and 10199, the Director for Region 34 issued an Order Consolidating Cases, and Consolidated Complaint, alleging that Dattco, Inc., herein called Respondent violated Section 8(a)(1) and (3) of the Act by discharging two employees employed at its Middletown, Connecticut facility, because of their activities on behalf of International Brotherhood of Teamsters, Local 559, AFL-CIO, herein called the Union, or Local 559, and allegedly committing other violations such as acts of interrogation, impression of surveillance, statements of futility, threats of reprisals, and promises of benefits.

On November 26, 2002, the Region issued a Complaint in Case No. 34-CA-10228, alleging that Respondent violated Section 8(a)(1) and (3) of the Act, by suspending and terminating employee Candida Szczepaniak, because she assisted the Union and engaged in other concerted activities. On November 28, 2002, all of the above cases were consolidated for hearing.

On February 27, 2003, the Director issued an Order severing cases, pursuant to an Informal Settlement Agreement which he had approved in Case Nos. 34-CA-10086, 10145, and 10199.

The hearing in the remaining case, Case No. 34-CA-10228, was held before me in Hartford, Connecticut on March 3 and 4, 2003. Briefs have been filed by General Counsel and Respondent and have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I issue the following:

## FINDINGS OF FACT

### I. JURISDICTON AND LABOR ORGANIZATION

Respondent is a Connecticut corporation with its corporate headquarters in New Britain, Connecticut, and other facilities in the State of Connecticut, where it is engaged in providing school bus and related transportation.

During the 12 month period, ending October 31, 2002, Respondent received gross revenues in excess of $250,000, and purchased and received at its Connecticut facilities, goods valued in excess of $50,000 directly from points outside the State of Connecticut.

Respondent admits, and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. FACTS

In the spring of 2002, the Union conducted an organizing campaign at Respondent's facilities located in Middletown, Westport, and New Britain, Connecticut. An election was held on June 14, 2002 at its Middletown plant. In addition to Local 559, the United Food and Commercial Workers, Local 919 (UFCW) also appeared on the ballot. The ballots in that election were impounded.

There was also an election held at Respondent's Westport facility in May of 2002. The UFCW was successful in that election. Negotiations commenced between Respondent and the UFCW throughout the summer. The parties eventually reached a contract in late October of 2002.

Insofar as the record reflects, there has been no petition filed by either Union to represent employees at Respondent's New Britain facility, where employee Candida Szczepaniak was employed as school bus driver starting in March of 1999.

While the Union as noted attempted to organize at both plants, no evidence of any anti-union animus was introduced concerning the New Britain plant. However, evidence was introduced concerning conduct of Respondent's officials at the Middletown plant. In that regard undenied and credited testimony of Jason and Barbara Hughes establishes several instances of conduct at the Middletown plant, by various admitted supervisors of Respondent, with respect to the Union.

Jason Hughes was a former supervisor of Respondent, and also the husband of Barbara Hughes, an employee at the Middletown facility, who was an open and active supporter of Local 559.

Their testimony establishes that on March 3, 2002, Respondent's Southern District Manager, Teddy Barra directed Dan Mozeako, Respondent's Head Dispatcher at Middletown to go to the Holiday Inn where a union meeting was being held and make a list of what buses were at the meeting. Mozeako complied with these instructions. Jason Hughes telephoned Mozeako, to find out what was taking him so long to come back. Mozeako informed Hughes that he was hiding behind a tree next to the door, listening to the meeting. Hughes then reported this information to Barra and Jose Bartolomeo, Respondent's Terminal Manager at Middletown.

On another occasion Jason Hughes was present at a meeting with Barra and Shirley Gralnick, Director of Customer Relations for Respondent. Bartolomeo was at the meeting for part of the time. Barra and Gralnick went over a list of employees and asked Hughes whether he thought each employee was in favor of or against the Union, or on the fence. They also informed Hughes that Bartolemeo thought certain named employees either wanted the Union or didn't want the Union. Hughes estimated that these kinds of meetings took place twice a week during the organizing drive to review the list of employees.

Jason Hughes was also present at management meetings, where numerous officials of Respondent were present including Barra, Mozeako, Bartolomeo, Pamela Martinez, Respondent's Vice-President of Human Resources and Risk Management, Respondent's President Don Devivo, as well as someone introduced as Respondent's lawyer. The supervisors were told that if they spoke to employees about the Union, they could tell them that they could lose benefits as a result of negotiations, but that they should not threaten, interrogate, make promises to employees, or to engage in surveillance of employees. The lawyer instructed the group to remember "TIPS", which stands for threaten, interrogate, make promise and surveillance, and told them that these things were illegal, should not be done, and that Respondent would campaign without doing any of those things. Hughes was told at this meeting that he as a supervisor was required to tell Respondent anything he knew about union activities of any employee, including his wife, and if he failed to do so, he could be fired.

On another occasion, Jason Hughes's wife Barbara had attended a union meeting in New Britain. Barra asked Jason if he knew that his wife had attended a Union meeting in New Britain, the night before. Jason replied that he was not aware of it, and added that he was amazed that Barra knew so much. Barra replied that she knew everybody that had attended the meeting.

On or about April 12, 2002 at 6:00 p.m., Barbara Hughes attended a union meeting in Middleton called by Local 559. Shortly thereafter, Hughes was called into the office of Barra, at the Middletown facility. Barra began the discussion by talking about UFCW handling out flyers at the end of the driveway, and talked about how many votes it takes to win a Union election. At the end of the meeting, Barra asked Hughes if she heard about what happened at the Teamsters meeting on Friday night. Hughes did not respond to Barra's question, and proceeded to leave the office. Present at this meeting in additional to Barra, were Mozeako, Bartolomeo and Jason Hughes.

Szczepaniak was hired by Respondent as a school bus driver in March of 1999 at the New Britain facility. On April 15, 2002, she signed a card for the Union. On May 2, 2002 Szczepaniak attended a union meeting at the home of Darlene Camacho, another driver at Respondent's New Britain facility. The next day, another driver at the terminal, Allison Dezi told her that she should "watch her back", if she had anything to do with the Union. She became concerned, and telephoned Bob Randall an organizer for Local 559. She explained what Dezi had told her, and said that she believed that she could be in trouble for attending the Union

meeting. Randall suggested that she could protect herself by handing out flyers outside Respondent's facility in New Britain.

Accordingly, on Monday morning, May 6, 2002, Szczepaniak met Randall outside the terminal prior to the start of her shift. In the morning Randall went inside the terminal and informed T. T. a dispatcher and admitted supervisor of Respondent, that he and Szczepaniak would be outside handing out flyers for Local 559. They then proceeded to hand out leaflets to employees coming into work, for about 20 minutes. Szczepaniak handed out approximately 10 flyers to employees.

Szczepaniak then went to work. That same morning, Dezi approached her and said "I warned you to watch your back. I told you not to have anything to do with the Union."

A day of so later, Szczepaniak complained to Pamela Martinez about Dezi's comments to her. She told Martinez that she had attended a Union meeting, and that employee Dezi had told her that she had better watch herself and that she could lose her job for going to a Union meeting. Martinez replied that Szczepaniak has a right to go to any meetings that she wants, and encouraged her to go to the Union meetings to educate herself and make a decision that's best for her. Martinez assured Szczepaniak that what Dezi had told her about losing her job was not true. Martinez added that although Szczepaniak felt that she would be targeted because of her union activities, that she (Martinez) would make sure that she is not targeted or discriminated against. Martinez informed Szczepaniak that if she has any problems, she could come see Martinez, and Martinez would make sure that she is not discriminated against.

Phil Johnson, Respondent's Vice-President of Operations for the Northern District, which includes the New Britain terminal, admitted that he was aware that Szczepaniak was interested in and a supporter of the Union. Johnson heard about this based on "scuttlebut" from other drivers. Johnson did not specifically recall whether he knew that she had handed out flyers or signed or gave out cards, but concedes that he had been informed that Szczepaniak had engaged in activities in support of the Union in May of 2002.

On May 10, 2002 Szczepaniak while driving a bus containing approximately 7 elementary school children, drove a mile or two off of her route to her home. She did so in order to pick up her wallet which she had left at home, in order to give money to the children to buy candy, as she previously had promised them. When she stopped the bus at her home, she told the children on the bus to crouch down, because she knew what she was doing was wrong. She left the bus, entered the porch of her house and retrieved her wallet. The bus arrived at school late.

Respondent received several complaints about this incident from parents, as well as officials from the Board of Education and the School. One of the parents insisted that her child not be driven by the driver of the bus that left the children unattended, and threatened to call the police.

At that time, the matter was investigated by Martinez, and Rosemary Thibeault, Respondent's Terminal Manager at New Britain. Thibeault and Martinez both recommended to Johnson that although Szczepaniak had committed several serious offenses, including leaving students in the bus unattended, and diverting from her route, as well as giving students candy, that she should not be terminated. They informed Johnson that they believed that Szczepaniak did not have a malicious intent and wasn't trying to do any harm to the children. Thus, although she used poor judgment, and had committed offenses which could justify termination, both Martinez and Thibeault asked Johnson to give Szczepaniak another chance and not terminate

her.

Martinez credibly testified that part of the reason that she made such a recommendation to Johnson was that she had just a few days earlier promised Szczepaniak that she would not be fired for going to a Union meeting.

Johnson also credibly testified, confirmed by Thibeault and Martinez, that he had initially decided to fire Szczepaniak in May for this incident, but because of the strong pleas from Martinez and Thibeault, decided to only suspend her for three days.

Szczepaniak was counseled about this incident separately by Thibeault, Johnson and Martinez. They informed her that she had violated company policies that prohibited giving candy to children, leaving her assigned route and leaving the children alone on the bus. They all made clear to her that she could have been terminated for this conduct, and she must follow company rules in the future or she would be discharged. Martinez expressly informed Szczepaniak that she was being given a "second chance", and that this was a "final warning". Johnson told her that if the parents called the police as threatened, and she was arrested, she would be terminated, but otherwise she would be suspended for three days.

Szczepaniak acknowledged to her supervisors that she had made a mistake, and said it would not happen again and that she would follow Respondent's policies in the future. Szczepaniak acknowledged at the trial that she was happy not to have been terminated as a result of the incident, and conceded that in her opinion, Respondent did not discriminate against her because of her Union activity, when it suspended her in May of 2002.[1]

Szczepaniak served her three day suspension on May 30, June 6 and June 13. She received a copy of a written disciplinary notice, dated May 20, 2002. It reflects the facts as detailed above, and concludes that she was suspended for three days for violating Respondent's rules as follows:

> Diverting from her route,
> Leaving students unattended in vehicles;
> Giving students candy.

The school year ended at the end of June. There is no work until the school started again in September of 2002 when Szczepaniak returned to work.

On September 5, 2002 during the first week of the school year, Szczepaniak was driving her morning bus route through downtown New Britain, carrying high school students. As she passed a city bus operated by New Britain Transportation Company, (NBT) that was pulling out after making a stop, Szczepaniak heard students say, "he's going to hit you, "Oh, he hit you". According to Szczepaniak she did not feel or hear any impact, and did not believe that there had been any contact with the other bus.

While stopped at a light, the NBT bus driver pulled up next to her, and attempted to talk to her through the window. Szczepaniak testified that she could not understand what the driver was trying to say to her. However, Szczepaniak admits that she said to the NBT driver, that he needs to be more careful.

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[1] Indeed the complaint makes no such allegation.

At the next red light, the NBT driver again pulled up next to Szczepaniak's bus and attempted to talk to her through the window, gesturing for her to open her door. She opened he door, but still could not hear what the NBT driver was trying to say to her.

She did not pull over to see if there was any damage or other evidence of contact with the NBT bus. She also did not call into dispatch to report the incident. She explained that she did not stop the bus, and check for damage, because she did not want to leave the bus unattended as she had in May when she was suspended.

Even when she returned to the yard, Szczepaniak did not check the bus to see if there was any damage, because she asserts that she did not believe that there was any contact since she did not hear or feel anything.

Szczepaniak also testified that she did not call into dispatch to report the incident, although she was aware of her responsibility to call and report accidents, because she did not believe that there was an accident at the time. However, in her affidavit given during the investigation, she claimed that she thought about calling the dispatcher after her encounter with the NBT bus, but did not call, "because my experience has been that I seldom, didn't get a response when I called in on the radio."

When she returned to the terminal, after her route was completed, Szczepaniak had a casual conversation with Thibeault, but did not mention the incident with the NBT bus.

On Friday, September 6, 2002, Thibeault received a phone call from a dispatcher for NBT, who informed her that on September 5 2002, Respondent's Bus No. 235 was driving too fast and "clipped' the mirror of the NBT bus while passing it. The dispatcher also informed Thibeault that the NBT driver caught up with the bus and told the driver what had occurred.

Thibeault then went outside to examine the bus along with the dispatcher. They noticed a scuff mark on the back end of the bus. She then called Szczepaniak into the office. Thibeault began by asking her, if anything happened the previous day on her run. Szczepaniak said no. Thibeault gave her another opportunity to report the incident by asking if she was sure that nothing happened the previous day "that I need to know about." Szczepaniak again said no. Thibeault then informed her about the call from the NBT dispatcher stating that her bus had struck the NBT bus, and that she and the dispatcher had seen a mark on her bus. Szczepaniak continued to deny any accident, so Thibeault and Szczepaniak went outside to look at the bus. After seeing the scuff mark on the bus, Szczepaniak admitted that there had been an incident, but said to Thibeault, "I didn't hit him, he hit me." At that point, Szczepaniak told Thibeault her version of the events the day before. She admitted that the students on board the bus had yelled to her that she had clipped the other bus. She also admitted that the other bus had followed her to a light, and tried to speak with her, but she was unable to hear what the other driver said. Szczepaniak insisted that the accident was the other driver's fault, and that he should have waited, and she was the one proceeding up the street.

Thibeault asked Szczepaniak why she didn't report the incident. Szczepaniak replied that she didn't see it as an accident, because she didn't feel any contact. She also told Thibeault that she wasn't feeling well. Thibeault told Szczepaniak that she should have said something to someone. She should have either gone on the radio immediately, or when she returned to the terminal reported it. Thibeault reminded Szczepaniak that when she returned to the terminal she saw Thibeault, and yet said nothing about the incident.

My description of the above conversation between Thibeault and Szczepaniak is based on a complication of the credited portions of the testimony of the two participants. For the most part, where the record revealed differences between their testimony, I have credited Thibeault's version of the discussion. I found her to be a more believable witness, and her testimony was consistent with a written summary of the relevant events, prepared by Thibeault shortly after the events in question. Szczepaniak on the other hand, I found to be evasive and unconvincing in her recitation of the conversation. Further her explanations for failing to call in to report the incident varied significantly between her testimony and her affidavit. Thus her affidavit reflects that she thought about calling in, but did not do so, because in the past, she was unable to get a response. Moreover, when she spoke to Thibeault about the issue, she mentioned that she wasn't feeling well, in addition to not believing that these had been an accident.

Accordingly, I do not credit Szczepaniak's testimony that Thibeault told her not to worry because the incident was not a big deal. I find it highly unlikely that Thibeault would make such a comment, in view of the overwhelming evidence that Respondent considered the failure to report an accident as serious misconduct.

After their conversation, Thibeault reported the facts as detailed above to Johnson. He instructed her to suspend Szczepaniak immediately pending further investigation. Thibeault prepared a suspension notice, dated September 5, 2002, for "failure to report an accident". The notice reflects that Respondent received a call from NBT stating that her bus clipped the mirror of the NBT bus while she passed him. The notice also states that Szczepaniak had responded that the NBT driver clipped her, and that as a reason for not reporting it, that she wasn't feeling well and didn't view the incident as an accident.

On Monday, September 9, 2002, Thibeault, Johnson and Martinez met to discuss the incident, as described by Thibeault. Martinez after hearing the facts stated, "I went out on the limb for her last time, but this time she has to be fired." Both Johnson and Martinez felt that based on Thibeault's report of the facts, that Szczepaniak knew that there had been an accident at the time, and had not reported it, in clear violation of Respondent's rules. In this regard, they emphasized that she had admitted that children in the bus had told her that there was contact between the buses. Further, although she had initially denied that there was an accident, after being confronted by Thibeault with evidence of her phone call from NBT and the scuff marks on the bus, Szczepaniak admitted that there was an accident, but claimed that it was the fault of the other driver. Johnson made the decision that Szczepaniak should be terminated. He noted that since she had been told by the students that there was contact, the other driver tried to tell about the accident, and she finally admitted the accident but asserted that the other driver hit her. Moreover, Johnson felt that based on the information that she admittedly had, i.e., the children telling her that there was contact, and the other driver attempting to communicate with her, at the very least she should have pulled over and checked the vehicle and or called into the Respondent and reported what had occurred. Thus based on the above, the decision was made to terminate Szczepaniak.

Johnson and Martinez testified that they saw no need to call in Szczepaniak to get her version of events directly, since she had already been spoken to by Thibeault, and they relied on Thibeault to accurately reflect Szczepaniak's response to the accusations against her.[2]

[2] Johnson also testified that he had instructed Thibeault to have Szczepaniak come to see him to discuss the incident, but that she never took advantage of that opportunity. Thibeault furnished no testimony in support of Johnson's assertion in this regard.

Johnson and Martinez further testify that the subject of Szczepaniak's union activities did not come up during this discussion, and that although they were both aware that she was a union supporter, and had engaged in union activities in May, these facts had no bearing whatsoever on their decision to recommend (Martinez) or to terminate her (Johnson).

The record reflects that Respondent maintains a strict rule requiring that all accidents be reported within 24 hours of occurrence. These rules are with known, and appear in Respondent's Employee Guide, which also states that "failure to report accident, incidents or injuries may result in immediate termination". The guide further states, that "if an employee is in doubt when to make such a report, he or she should call their immediate supervisor or the Safety Department for clarification."

Martinez credibly testified that Respondent's policy is to terminate any employee who fails to report an accident, if the employee is aware of the accident. In this regard Martinez identified four employees Werner Seider, John Mizkowski, Acey Williams and Clarence Lloyd who were fired for failing to report an accident at various times between 1998 and 2003. The records of these incidents do reflect that these drivers were terminated, at least in part for the failure to report accidents. However, the records are not clear as to whether or not the drivers had denied knowing about the accident, after being confronted with the accusation. One of the reports, the discharge of Williams, did indicate that Williams had lied to a supervisor about the accident. Further the records reveal that in at least two of the prior cases, there was substantial damage involved in the accidents.

Evidence was adduced concerning an incident involving Jane Thielen, a driver at the Middletown Terminal, who was involved in an accident a few days before the trial in the instant case. The record reveals that Thielen had pulled over her bus to let a car pass, and made contact with a parked car, as she drove away. Thielen did not stop nor report the incident. However, someone had seen the accident and called the police. The police contacted Respondent, and Teddy Barra went to the scene with the terminal manager to investigate. Thielen was summoned to the scene as well. Thielen told the police and Barra that she was not aware that she had hit a parked car, and that none of the students on the bus had realized that there had been an accident.

Thielen was not terminated, because according to Respondent's witnesses, Martinez and Johnson, that Respondent was satisfied, based on the comments of the police and Thielen that she did not know that she had struck the car. The police filed a report reflecting Thielen's version of events, and told Respondent's managers that they were confident that Thielen was unaware of having been involved in an accident. While the police report reflects that Thielen was given a verbal warning to "drive right", no action was taken against her for leaving the scene of the accident. While the police report did indicate that there was "damage" to the car at the "left front", it does not state how extensive or prominent the damage was. Barbara Hughes testified that she had passed by the scene at the time, and observed Barra talking to Thielen. Hughes added that she observed a crease of a foot and a half on the front quarter panel of the car. Hughes of course, could not testify as to whether this damage had been caused by the bus, or whether it was there before the bus struck the car. Therefore, the only discipline executed upon Thielen was retraining.

## III. ANALYSIS

The standard for evaluating employer discipline involving employer motivation is well settled. General Counsel must first establish by a preponderance of the evidence that protected activity of the employee was a motivating factor in the employer's decision to discipline the

employee. If General Counsel meets that prima facie burden, the burden of proof shifts to the Employer to establish that it would have taken the same action, absent the employee's protected conduct. *Wright Line*, 251 NLRB 1083 (1980), *NLRB v. Transportation Management*, 462 U.S. 393, 397, 401-403 (1983).

Here in my judgment General Counsel has failed to meet its initial burden of establishing that the protected conduct of Szczepaniak was a motivating factor in its decision to discharge her in September of 2002.

While the evidence is undisputed that Respondent was aware that Szczepaniak was a union supporter and engaged in union activity, such as leafleting in May of 2002, that evidence is hardly sufficient to establish a link between that protected activity, and her termination four months later.

General Counsel relies in part on the animus towards union activity, demonstrated by evidence concerning Respondent's conduct at the Middletown facility. I agree that the evidence does support an inference that Respondent engaged in unlawful surveillance of a union meeting, and that Respondent's officials asked an employee if she had heard about what happened at the Teamsters meeting on Friday night. Thus latter question might be construed as an unlawful interrogation[3] and or the unlawful creation of the impression of surveillance. However, in my view this evidence of animus is minimal, the acts were committed at a different location, and by supervisors who were not involved in the decision to discharge Szczepaniak. Therefore, I conclude that such evidence is insufficient to establish a link between her discharge in September, 4 months after the coercive conduct.

Most importantly, the timing of the discharge, not only does not support General Counsel's case, but is highly detrimental to a finding of discriminatory motivation. Thus in May of 2002, within a week of Respondent becoming aware of her union activity, Szczepaniak engaged in misconduct, for which she admittedly could been discharged, but instead was given only a three day suspension. She violated Respondent's rules, by going off her route, leaving the children unattended asking them to crouch down to avoid being seen, and giving them candy. Szczepaniak admits that she was happy not to have been fired for this incident, and indeed the three day suspension was not alleged as being unlawful.

I conclude that if Respondent was motivated to terminate her based on her union activity, it had a perfect opportunity to do so at that time. I note that with respect to that incident, parents threatened to call the police, if Szczepaniak continued to transport their children. Yet Respondent treated her magnanimously in May, when her activity was current, and gave her a three day suspension, final warning and merely changed her route. This is not the conduct of an employer desiring to punish an employee for engaging in union activity.

In fact, the evidence supports the conclusion, that if anything, her union activity saved her from possible termination in May. Immediately prior to her misconduct, Szczepaniak had complained to Martinez that a fellow employee had told her to watch her back because of her union activity. Martinez assured Szczepaniak that she would not be fired for engaging in such activity, and encouraged her to attend union meetings to find out all the information involved.

[3] I note that Hughes was an open union adherent, making the finding that the questioning was coercive, somewhat uncertain.

Therefore, when Szczepaniak engaged in the afore described misconduct, Martinez recommended to Johnson, who wanted to terminate Szczepaniak in May, that Respondent give her another chance and not discharge her. Martinez credibly testified, and I agree, that her decision to recommend leniency for Szczepaniak in May, was in part motivated by her previous promise to Szczepaniak that she would not be terminated for her union activity. It is clear that Martinez felt that she had in effect, promised to protect her from discharge, and since this promise was made, shortly before the misconduct, she felt obligated to go to bat for Szczepaniak. While it is not certain that Respondent would have terminated Szczepaniak in May, absent Martinez's recommendation,[4] I believe based on my impression of Johnson, that it is likely that Respondent would have discharged Szczepaniak absent Martinez's recommendation.

In any event, regardless of what Respondent would have done in May, absent Martinez's position, what is most significant is that it did not terminate Szczepaniak in May, when it had a perfect opportunity to do so at the time of her union activities. I find that the failure of Respondent to do so at that time, negates any possible inference of union discrimination in the circumstances of this case, and I conclude that General Counsel has failed to establish that Szczepaniak's union activity was a motivating factor in the decision of Respondent to terminate her in September 2002.

General Counsel, recognizing this defect in her case, cites *Marcus Management*, 292 NLRB 251, 262 (1989), where the ALJ, affirmed by the Board observed, "there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will." The ALJ therein concluded that the Employer there had wanted to fire an employee for union activity immediately, but decided to wait 6 months until the appropriate occasion arose. However, in that case there was no evidence, as here, that the Employer had a clearly valid reason to terminate the employee at the time of the union activity, but did not choose to discharge the employee when it could have done so. Further, the ALJ also found the asserted reason for discharge to be pretextual for various other reasons, which are also not present here.

General Counsel does assert however that the decision here was pretextual for several reasons, none of which I find to be persuasive. General Counsel notes that the Board has consistently held that an employer's failure to conduct a fair and complete investigation gives rise to an inference of anti-union animus. *Publishers Printing Co*. *Inc.*, 317 NLRB 933, 938 (1995); *Burger King Corp*., 279 NLRB 227, 239 (1986). Moreover, the failure to afford the discriminatee a chance to explain his or her version of events, can be considered a rush to judgment and indicative of an unlawful motive. *Milford Plains, d/b/a Hampton Inn,* 309 NLRB 942, 946-947 (1994). General Counsel argues in this regard, that Respondent did not conduct a fair and complete investigation of the facts, because it failed to give Szczepaniak a chance to explain her version of events. I do not agree.

Szczepaniak was given an opportunity to explain her position, when she spoke with Thibeault. Moreover, Thibeault communicated to her superiors, Szczepaniak's alleged defense to Szczepaniak's failure to report the accident, that she did not know at the time of the accident that there had been contact between the buses.

While it might have been preferable for Respondent to have called Szczepaniak into speak to Johnson and Martinez, to give her an opportunity to contradict Thibeault's report, I do not find it necessarily unlawful for Respondent to have relied on its supervisor to present an

[4] I note that Thibeault also recommended leniency for Szczepaniak at that time.

accurate summary of the events in question, including Szczepaniak's responses.

Therefore, based on the facts presented, including that Szczepaniak initially denied knowing about the accident, but after being confronted with the call from NBT and the scuff mark on the bus, then changed her story to blaming the other driver for the accident, plus the fact that students told Szczepaniak that there was contact, Respondent reasonably concluded that she knew or should have known about the accident and had failed to report it. I therefore attach little significance to Respondent's failure to afford Szczepaniak another opportunity to explain her position, since she had already done so to Thibeault. It is also significant that even under Szczepaniak's version of events, which I have not totally credited, she admitted being told by the students that there was contact between the buses, and that the driver of the other bus had tried to communicate with her. Notwithstanding these facts, she admittedly failed to even check the bus for damage, or call in the incident to Respondent. This conduct alone is also highly suspicious and indicative of misconduct.

Finally, General Counsel also alleges that Respondent engaged in disparate treatment which supports the inference of animus and discriminatory motivation. *Electronic Data Systems Corp*., 305 NLRB 219 (1991); *Columbian Rope Co*., 299 NLRB 1198 (1991). In this regard General Counsel relies on the incident involving Jane Thielen, who also failed to report an accident, but was not terminated, and the only discipline exacted on her was retraining. However, in my view that case was significantly different from Szczepaniak's situation. Thielen, although she did not report the accident, immediately returned to the scene after being summoned by the police, and credibly told the police and Respondent that she did not know that her bus had scraped a parked car. Significantly, the police were convinced that Thielen was telling the truth, and did not cite her for leaving the scene of an accident or give her a summons for any reason. Further, Respondent had no reason to disbelieve Thielen's assertion that she did not know that she had scraped a car.

Szczepaniak, on the other hand, gave Respondent ample reasons to disbelieve her testimony, including the fact that the children had informed her that there was contact, the driver of the other bus tried to communicate with her, and Szczepaniak's attempt to deflect blame from herself, claiming that the other driver was at fault. These facts led Respondent to the reasonable conclusion that Szczepaniak had knowingly failed to report an accident, which was unlike the case of Thielen. Therefore, I do not find that Thielen's situation revealed disparate treatment, sufficient to establish discriminatory conduct by Respondent.

Accordingly, based on the foregoing, I conclude that General Counsel has failed to establish that Szczepaniak's union activities were a motivating factor in Respondents decision to discharge her in September of 2002.

Moreover, even if a prima facie case is found that a motivating factor in her discharge was Szczepaniak's protected conduct, I would conclude that Respondent has established that it would have terminated Szczepaniak, absent her protected conduct. In this respect, Respondent's witnesses credibly testified that the failure report an accident is considered a serious and dischargeable offense. This testimony is supported by evidence that at least 4 other employees were terminated for the failure to report an accident. General Counsel correctly observes, that these other cases are not identical to Szczepaniak's, in that some of them involved significant damage, and it is not clear if all of the employees involved in those cases denied knowing about the accident.[5] However, the fact is that all of the discharges were

[5] I note that one employee was accused of lying to the supervisor about the accident.

effectuated, at least in part for failing to report an accident, and these cases are supportive of the testimony of Respondent's witnesses, that the misconduct of Szczepaniak was considered a dischargeable offense, and that it would have discharged her absent her union activity, I so find.

I therefore recommend dismissal of the complaint.

On these findings of fact and conclusions of law and based upon the entire record, I issue the following recommended,[6]

**ORDER**

The Complaint is dismissed in its entirety.

Dated, Washington, D.C.

_____
Steven Fish
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.